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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application of: Steven Curtis Zicker
Application No: 10/065,326
Filed: October 3, 2002
Title: METHOD OF USING OMEGA-3 FATTY ACIDS
Group Art Unit: 1617
Confirmation No: 9314
Examiner: Jennifer M. Kim
Date: January 13, 2006
Attorney Ref: IR 7017-00

TRANSMITTAL LETTER

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313


Dear Sir:

Transmitted herewith is an Appeal Brief submitted pursuant to 37 C.F.R. §41.37. Please charge the fee for filing a brief in support of an appeal under 37 C.F.R. §41.20(b)(2) to Deposit Account No. 502957.

Applicants respectfully request an extension of time to permit filing of this Appeal Brief within one (1) month subsequent to the two (2) month period for filing an Appeal Brief set fourth in 37 C.F.R. §41.37, originally due on December 14, 2005. Please charge the fee required by 37 CFR §1.136 and §1.17 to Deposit Account Number 502957.

Please charge any shortage in fees or credit any excess fees during the entire pendency of this Application to Deposit Account No. 502957.

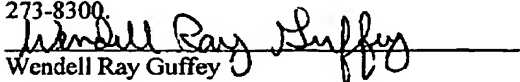
Respectfully submitted,


Wendell Ray Guffey
Reg. No. 31,762
Phone: 785-286-8285
Email: ray_guffey@hillspet.com

Hill's Pet Nutrition, Inc.
Capitol Tower Building
400 SW 8th Avenue
Topeka, Kansas 66603

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that this correspondence is being transmitted by facsimile to the Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on January 13, 2006 at facsimile number 571-273-8300.


Wendell Ray Guffey

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

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APPEAL BRIEF PURSUANT TO 37 C.F.R. §41.37

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P.O. Box 1450
Alexandria, VA 22313

Dear Sir:

Appellants hereby appeal to the Board of Patent Appeals and Interferences from the Final Rejection of Claims 1-7 and 9-11 in this Application.

Appellants filed a timely Notice of Appeal on October 14, 2005 under 37 C.F.R. §41.31(a) from the action of the Examiner in finally rejecting Claims 1-7 and 9-11 in the Application.

I. Real Party in Interest

The real party in interest is Hill's Pet Nutrition, Inc., a Delaware corporation having a place of business at 400 SW 8th Avenue, Topeka KS 66603, the assignee of record and a wholly-owned subsidiary of Colgate-Palmolive Company, a Delaware corporation having a place of business at 300 Park Avenue, New York, NY 10022.

II. Related Appeals and Interferences

Appellant knows of no other appeals or interferences that will directly affect or be directly affected by or that have a bearing on the Board's decision in the pending appeal.

III. Status of Claims

Claims 1-7 and 9-11 are pending in the application and are the subject of this appeal. Claims 1, 2, 5, 6, and 9-11 stand rejected under 35 U.S.C. §102(e) as being anticipated by Davenport et al., WO 2004/006688 A1 (hereinafter "Davenport"). Claims 3, 4, and 7 stand rejected under 35 U.S.C. §103(a) as obvious over Davenport.

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IV. Status of Amendments

No amendment was filed subsequent to final rejection. Pending claims 1-7 and 9-11 correspond to those submitted on March 29, 2005 in response to the non-final Office action mailed December 29, 2004. A copy of the pending claims is included in Appendix A hereto, in accordance with 37 C.F.R. §41.37(c)(1)(viii).

V. Summary of Claimed Subject Matter

The present invention generally provides methods for influencing behavior in an animal. As defined in independent claim 1, the method comprises systemically administering to the animal a composition comprising at least about 0.5% by weight of an omega-3 fatty acid or mixture of omega-3 fatty acids as measured on a dry matter basis. Independent claim 1 is supported in the specification, for example, at paragraphs [0007] to [0009] on pages 2 and 3.

VI. Grounds of Rejection to be Reviewed on Appeal

- A. Is the invention as claimed in pending claims 1, 2, 5, 6, and 9-11 anticipated under 35 U.S.C. §102(e) by Davenport?
- B. Is the invention as claimed in pending claims 3, 4, and 7 obvious under 35 U.S.C. §103(a) over Davenport?

VII. Argument

As noted above, the present invention provides methods for influencing behavior in an animal. The methods comprise systemically administering to the animal a composition comprising at least about 0.5% by weight of an omega-3 fatty acid or mixture of omega-3 fatty acids. Appellant respectfully submits that the present invention is novel and non-obvious over the Davenport reference. In particular, nothing in the reference remotely teaches or suggests systemically administering to an animal a composition comprising at least about 0.5% by weight of an omega-3 fatty acid as required by the instant claims.

A. Rejection under 35 U.S.C. §102(e)

1. Applicable Law

A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. MPEP 2131, citing *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed Cir. 1987).

2. Rejection of Claims 1, 2, 5, 6, 9 and 10

Appellant respectfully submits that claim 1 is not anticipated by Davenport. Davenport reports methods of moderating the behavior of a dog living in an animal shelter wherein the dog is fed a "high quality" diet and provided with periodic human interaction. Although the reference describes diets containing a "high amount" of DHA and EPA, Davenport fails to describe any diet containing at least about 0.5% by weight of an omega-3 fatty acid or a mixture of omega-3 fatty acids as required by claim 1.

Appellant submits that the Examiner has misconstrued the reference in rejecting claim 1. In particular, at pages 3 and 4 of the rejection, the Examiner contends that "Davenport teaches the diet can be formulated with 0.25% of DHA and 0.25% of EPA (page 8, first and second full paragraph)." However, the cited paragraphs on page 8 of the reference discuss six alternative embodiments containing either DHA or EPA.

Specifically, the first full paragraph reports a first embodiment wherein the "DHA level is at least about 0.05%, alternatively at least about 0.1%, alternatively at least about 0.15% of the diet;" a second embodiment wherein the "DHA level is from about 0.05% to about 0.25% of the diet;" and a third embodiment wherein the "DHA level is from about 0.07% to about 0.18% of the diet." In the second full paragraph, Davenport describes further alternative embodiments containing EPA instead of DHA. For example, the second full paragraph describes a fourth embodiment wherein "the EPA level is at least about 0.05%, alternatively at least about 0.1%, alternatively at least about 0.15% of the diet;" a fifth embodiment wherein the "EPA level is from about 0.05% to about 0.25% of the diet;" and a sixth embodiment wherein the "EPA level is from about 0.07% to about 0.18% of the diet." Because nothing in the first and second full paragraphs on page 8 of the reference describes any embodiment containing both EPA and DHA, the Examiner is mistaken in concluding that Davenport teaches a diet with 0.25% DHA and 0.25% EPA.

Further, the only embodiments wherein Davenport reports a diet containing a mixture of EPA and DHA are in Example 1 on page 14 of the reference. In Example 1, the reference describes "Diet A" containing 0.02% EPA and 0.03% DHA (i.e., 0.05% by weight total) and "Diet B" containing 0.13% EPA and 0.18% DHA (i.e., 0.31% by weight total). See Table 3 on page 14. However, Davenport is again silent on any composition containing at least about 0.5% by weight of omega-3 fatty acids. Because Davenport does not discuss any diet having more than 0.25% by weight of a single omega-3 fatty acid or 0.31% by weight of a mixture of omega-3 fatty acids, claim 1 requiring at least about 0.5% by weight

of an omega-3 fatty acid or a mixture of omega-3 fatty acids is not anticipated by the reference.

Claims 2, 5, 6, 9 and 10, which depend directly or indirectly from claim 1, contain all limitations of claim 1 and are accordingly novel over Davenport for at least the same reasons as set forth above with respect to claim 1. Thus claims 1, 2, 5, 6, 9 and 10 are not anticipated by Davenport. Reconsideration and withdrawal of the rejection of these claims under 35 U.S.C. §102(b) is requested.

3) Rejection of Claim 11

Claim 11, which depends from claim 1, further limits the claim to require that the composition comprises from about 1% to about 5% by weight of a mixture of EPA and DHA. Thus, even if Davenport were found to teach up to 0.5% of a mixture of EPA and DHA, which is not admitted herein, claim 11 is not anticipated by Davenport. As shown above, Davenport does not teach a diet having more than 0.25% by weight of a single omega-3 fatty acid or 0.31% by weight of a mixture of omega-3 fatty acids. Reconsideration and withdrawal of the rejection of claim 11 under 35 U.S.C. §102(e) is requested.

B. Rejection under 35 U.S.C. § 103(a)

1. Applicable Law

To establish a *prima facie* case of obviousness on a single reference, there must be some suggestion or motivation, either in the reference itself or in the knowledge generally available to one of ordinary skill in the art, to modify the reference. Further, the reference must teach or suggest all of the claim limitations. See MPEP 2143.

2. Rejection of claims 3, 4 and 7

Claims 3, 4, and 7, which depend from claims 1 and 2, are directed to methods for influencing behavior in a dog or cat by systemically administering to the dog or cat a composition comprising at least about 0.5% by weight of an omega-3 fatty acid or a mixture of omega-3 fatty acids. Claims 3, 4, and 7 further limit the methods of the present invention by specifying the age of the dog or cat to which the composition is administered.

Appellant respectfully submits that the Examiner has failed to establish a *prima facie* case of obviousness of claims 3, 4, and 7 over Davenport. As stated above with respect to the novelty of claim 1, Davenport discusses methods of moderating the behavior of a dog living in an animal shelter wherein the dog is fed a "high quality" diet and provided with periodic human interaction. However, nothing in the reference teaches or suggests administering a composition comprising at least about 0.5% by weight of an omega-3 fatty

acid or a mixture of omega-3 fatty acids to an animal. Davenport does not discuss any diet containing more than 0.25% by weight of an individual omega-3 fatty acid or 0.31% by weight of a mixture of omega-3 fatty acids. Thus, Davenport does not teach all limitations of the claims.

Furthermore, no motivation can be found in Davenport, and no motivation has been adduced from knowledge generally available to one of skill in the art, to modify Davenport in a way that would lead to the invention embodied in claims 3, 4, and 7. Davenport fails to isolate any effect caused by omega-3 fatty acids from a general nutrition effect caused by administering the "high quality" diet to a sheltered dog. The "high quality" diet, Diet B, discussed in the reference was not richer in omega-3 fatty acids alone. In fact, as shown in Table 3, the "high quality" diet was richer in protein, total fat, beet pulp, DHA, EPA, and metabolizable energy as compared to the control diet, Diet A. Thus, considering the art as a whole, the cited reference may arguably be relevant to a generally nutrient-enriched diet, but the reference carries no teaching or suggestion specifically relevant to an omega-3 enriched diet.

At least because Davenport fails to isolate any effect of omega-3 fatty acids on the behavior of an animal, and because the reference does not discuss the administration of a diet containing at least about 0.5% by weight of an omega-3 fatty acid, Appellant respectfully submits that one skilled in the art would not be motivated by the cited reference to practice the present invention, which requires administering at least about 0.5% by weight of an omega-3 fatty acid or a mixture of omega-3 fatty acids to an animal. Thus, no motivation exists to modify the reference to lead to the invention as described in claims 3, 4 or 7.

Accordingly, as Davenport fails to teach or suggest all the present claim limitations, and no motivation exists to modify Davenport to arrive at the present invention, a *prima facie* case of obviousness has not been established. Thus, Appellant submits that the present invention is not obvious over Davenport. Reconsideration and withdrawal of the rejection of claims 3, 4, and 7 under 35 U.S.C. §103(a) is requested.

C. Conclusion

Appellant submits that by the argument provided above, none of the grounds of rejection against the present claims can be sustained. All claims are believed to be allowable. Appellant respectfully seeks the Board's reversal of all grounds of rejection of the present claims.

VIII. Claims Appendix

The Board's attention is respectfully drawn to Appendix A hereto.

IX. Evidence Appendix

No evidence is entered in this Appeal Brief.

X. Related Proceedings Appendix

No related proceedings are identified herein.

Respectfully submitted,



Wendell Ray Guffey

Reg. No. 31,762

Phone: 785-286-8285

Email: ray_guffey@hillspet.com

Hill's Pet Nutrition, Inc.
Capitol Tower Building
400 SW 8th Avenue
Topeka, Kansas 66603

Appendix A

Claims Pending on Appeal

1. (previously presented) A method for influencing behavior in an animal, the method comprising systemically administering to the animal a composition comprising at least about 0.5% by weight of an omega-3 fatty acid or mixture of omega-3 fatty acids as measured on a dry matter basis.
2. (original) The method in accordance with claim 1 wherein the animal is a dog or a cat.
3. (original) The method in accordance with claim 2 wherein the dog or cat is about 1 to 6 years of age.
4. (original) The method in accordance with claim 2 wherein the dog or cat is at least about 7 years of age.
5. (original) The method in accordance with claim 2 wherein the dog or cat has an observable behavior deficit prior to administration of the omega-3 fatty acid or mixtures thereof.
6. (original) The method in accordance with claim 2 wherein the dog or cat does not have cancer or arthritis.
7. (original) The method in accordance with claim 2 wherein the dog or cat is up to about 1 year of age.
8. (withdrawn) A composition suitable for systemic administration to a young adult or aged pet animal which comprises a carrier and a behavior influencing quantity of an omega-3 fatty acid or a mixture of omega-3 fatty acids.
9. (previously presented) The method in accordance with claim 1, wherein the composition comprises from about 0.5% to about 10% by weight of an omega-3 fatty acid or a mixture of omega-3 fatty acids.
10. (previously presented) The method in accordance with claim 9, wherein the omega-3 fatty acid is selected from the group consisting of EPA, DHA, ALA, octadecatetraenoic acid, and mixtures thereof.
11. (previously presented) The method in accordance with claim 10, wherein the composition comprises from about 1% to about 5% by weight of a mixture of EPA and DHA.